

**Testimony of W. Douglas Buttrey**  
**Chairman of the Surface Transportation Board**  
**House Committee on Transportation and Infrastructure**  
**Subcommittee on Railroads**  
**Hearing on Impacts of Railroad-Owned Waste Facilities**  
**10 a.m. May 23, 2006**

Good morning Mr. Chairman. My name is Douglas Buttrey, and I am the Chairman of the Surface Transportation Board. I appreciate the opportunity to testify before you today about federal preemption for rail-related facilities. I would first like to provide the Subcommittee with an overview of the Board's role, and the role of state and local authorities with regard to such facilities. Next, I will discuss the state of the law on this complex issue which is still being fleshed out by the Board and the courts in individual cases that arise. Finally, because there has been a lot of concern lately about the potential for misuse of federal preemption in cases involving facilities on rail lines, I will outline how interested parties can raise concerns before the Board and in the courts regarding individual proposals that arise. I will not focus today on the individual cases that have addressed federal preemption for rail-related facilities, but I have included as part of my written testimony a summary of the relevant case law.

1. The Scope of the Federal Preemption

As all of you are aware, the Surface Transportation Board was created in the ICC Termination Act of 1995 (ICCTA). The express federal preemption contained in the Board's governing statute at 49 U.S.C. 10501(b) gives the Board exclusive jurisdiction over "transportation by rail carriers." Congress has defined the term "transportation" broadly, at 49 U.S.C. 10102(9), to include all of the related facilities and activities that are part of rail transportation. The purpose of preemption is to prevent a patchwork of

otherwise well intentioned local regulation from interfering with the operation of the rail network to serve interstate commerce.

Both the Board and the courts have made clear, however, that, although the scope of the section 10501(b) preemption is broad, there are limits. While a literal reading of section 10501(b) would suggest that it preempts all other law, neither the Board nor the courts have interpreted the statute in that manner. Rather, where there are overlapping federal statutes, they are to be harmonized, with each statute given effect to the extent possible. This is true even for federal statutory schemes that are implemented in part by the states, such as the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act.

When states or localities are acting on their own, certain types of actions are categorically preempted, regardless of the context or basis of the action. This includes any form of permitting or preclearance requirement—such as building, zoning, and environmental and land use permitting—which could be used to deny or defeat a railroad's ability to conduct its rail operations or to proceed with activities that the Board has authorized. Also, states or localities cannot regulate matters directly regulated by the Board, such as railroad rates or service or the construction, operation, and abandonment of rail lines.

Otherwise, whether the preemption applies depends on whether the particular action would have the effect of preventing or unreasonably interfering with rail transportation. Types of state and local measures that have been found to be permissible, even in cases that qualify for the federal preemption, include requirements that railroads share their plans with the community when they are undertaking an activity for which a

non-railroad entity would require a permit, or that railroads comply with local electrical, fire, and plumbing codes.

In cases involving facilities that require a license from the Board and an environmental review under the National Environmental Policy Act (NEPA), the Board addresses both the transportation-related issues and any environmental issues that are raised. The environmental review is managed by the Board's Section of Environmental Analysis.

Even where no license is needed from the Board, there are several avenues of recourse for interested parties, communities, or state and local authorities concerned that the section 10501(b) preemption is being wrongly claimed to shield activities that do not rightly qualify for the federal preemption. Any interested party can ask the Board to issue a declaratory order addressing whether particular operations constitute "rail transportation" conducted by a "rail carrier." Alternatively, parties are free to go directly to court to have that issue resolved. Some courts have chosen to refer that issue to the Board; others have decided the matter themselves. It is worth noting, however, that the Board and court cases on the boundaries of the section 10501(b) preemption have been remarkably consistent, and that the Board and the courts have never reached a different conclusion regarding the availability of the preemption for particular activities and operations.

Finally, in some cases, environmental and safety concerns have been successfully resolved through consensual means, by the railroad and the community working together to address their respective interests.

## 2. Relevant Precedent on Facilities

Given the strength and breadth of the section 10501(b) preemption, the potential for misuse is a definite concern. Thus, both the Board and the courts have made clear that an entity is not entitled to federal preemption to the extent it is engaged in activities other than rail transportation. In some cases, solid waste and other businesses have located close to a railroad and claimed to be a rail facility exempted from state and local laws that would otherwise apply, but have been found by the Board or a court not to be entitled to the federal preemption because the operation did not actually constitute “rail transportation” by a “rail carrier.” In other cases, activities and operations at facilities have been found to qualify for the federal preemption, as part of the transportation conducted by a rail carrier.

Cases involving solid waste transfer, storage and /or processing facilities proposed to be located along rail lines are especially controversial and often raise concerns that the operations could cause environmental harm. In every case, however, interested parties, communities, and state and local authorities concerned about a proposal have recourse to the Board or the courts.

Rail carriers need approval to construct a new rail line under 49 U.S.C. 10901. During the Board’s licensing proceedings, parties concerned that all or part of the project is not entitled to preemption have the opportunity to present their views to the Board for consideration in the proceeding. In rail construction cases, the Board also routinely conducts a detailed NEPA review, allowing all interested parties the opportunity to raise any environmental concerns. The Board then takes the entire environmental record into account in deciding whether to grant the license. The Board can, and often does, impose

appropriate environmental conditions to address the environmental concerns that are raised. Thus, the Board's existing process has proven to be sufficient to allow the agency to address any issues related to proposed solid waste or other facilities along the line.

If the project involves the acquisition and operation of an existing rail line, or the acquisition of a rail carrier by another carrier or carrier-affiliate, authority from the Board also is required, and NEPA is applicable. Normally, however, a proposal to change the owner or the operator of a line will not have any significant effects on the environment. Therefore, the Board does not always conduct a case-specific environmental analysis. But where there is a potential for significant impacts, and that is brought to the Board's attention, the Board may decide to undertake a full environmental review.

Finally, some activities at facilities on or along rail lines may qualify for the preemption in section 10501(b) but not require Board approval and review, so that there is no occasion for the Board to conduct an environmental review. For example, under the statute, carriers may make improvements and add new facilities (including a solid waste facility) to an existing line without seeking Board approval. Even in these types of cases, however, parties concerned that section 10501(b) is being used to shield activities that do not qualify for the federal preemption under section 10501(b) can ask the Board to issue a declaratory order, or a stay, or go directly to court to address the status of the facility.

The inquiry into whether and to what extent the preemption applies in a particular situation is naturally a fact-bound question. There have been only a few cases that have come before the Board involving solid waste facilities. The Board and the courts will continue to explore where the boundary may lie between traditional solid waste activities

and what is properly considered to be part of “rail transportation,” and what kinds of state and local actions are federally preempted, in the individual cases that arise.

### **CONCLUSION**

In conclusion, it is important to reiterate that, although both the Board and the courts have interpreted section 10501(b) preemption broadly, there are limits on the preemption, which is harmonized with other federal laws. The question of what constitutes “transportation by rail,” according to the statute and precedent addressing the rights of railroads and of state and local authorities under section 10501(b), is still being fleshed out by the Board and the courts in the individual cases that arise. However, it is clear that not all activities are entitled to preemption simply because the activities take place at a facility located on rail-owned property. Of course, cases involving preemption for railroad facilities are likely to remain controversial. But even in cases that do not require review and approval by the Board, parties concerned that the section 10501(b) preemption is being misused in a case involving a facility have ways to raise their concerns at the Board or in the courts.

I appreciate the opportunity to discuss these issues with you today, and would be happy to answer any questions you may have.

## SECTION 10501(b) PREEMPTION

### 1. Section 10501(b)

- Gives Board exclusive jurisdiction over “*transportation by rail carriers*” and expressly preempts any state law remedies with respect to rail transportation; ICA defines “transportation” broadly to include all of the related facilities and activities that are part of rail transportation (section 10102(9))
- Purpose of section 10501(b) is to prevent patchwork of local regulation from unreasonably interfering with interstate commerce

### 2. Reach of the Section 10501(b) Preemption

- Statute not limited to “economic” regulation (City of Auburn v. United States, 154 F.3d 1025 (9<sup>th</sup> Cir. 1998))
- While most state and local laws are preempted, overlapping federal statutes (including environmental statutes) are to be harmonized, with each statute given effect to the extent possible (Tyrrell v. Norfolk Southern Ry., 248 F.3d 517 (6<sup>th</sup> Cir. 2001) (there is no “positive repugnancy” between the Interstate Commerce Act and the Federal Railway Safety Act); Friends of the Aquifer et al., STB Finance Docket No. 33396 (STB served Aug. 15, 2001) (Congress did not intend to preempt federal environmental laws such as the Clean Air Act and the Clean Water Act, even when those statutory schemes are implemented in part by the states))
- Two types of state and local actions are categorically preempted:
  - (1) any form of state and local preclearance or permitting that, by its nature, could be used to deny or defeat the railroad’s ability to conduct its operations (City of Auburn v. United States, 154 F.3d 1025 (9<sup>th</sup> Cir. 1998) (environmental and land use permitting categorically preempted); Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005) (preconstruction permitting of transload facility necessarily preempted by section 10501(b)) and
  - (2) state or local regulation of matters directly regulated by the Board (CSXT Transportation, Inc.-Pet. For Decl. Order, STB Finance Docket No. 34662 (STB served March 14, 2005), reconsideration denied (STB served May 3, 2005), petitions for judicial review pending, District of Columbia v. STB, No. 05-1220 et al. (D.C. Cir. filed June 22, 2005) (any state or local attempt to determine how a railroad’s traffic should be routed is

preempted); Friberg v. Kansas City S. Ry., 267 F.3d 439 (5<sup>th</sup> Cir. 2001) (state statute imposing limitations on a railroad expressly preempted); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009 (W.D. Wis. 2000) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted))

- **Otherwise, preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation** (Dakota, Minn. & E.R.R. v. State of South Dakota, 236 F. Supp.2d 989 (D. S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8<sup>th</sup> Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state "regulation" of railroads))
- **Notwithstanding section 10501(b), it is permissible to apply state and local requirements such as building, fire, and electrical codes to railroad facilities so long as they are not applied in a discriminatory manner; however, need to seek building permit is preempted** (Flynn v. Burlington N. Santa Fe. Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000); Borough of Riverdale — Pet. for Decl. Order — The New York Susquehanna & Western Ry., STB Finance Docket No. 33466 (STB served Sept. 10, 1999, and Feb. 27, 2001)).
- **Railroads are encouraged to work with localities to reach reasonable accommodations** (Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (STB served Dec. 1, 2003) (carrier cannot invoke section 10501(b) preemption to avoid obligations under an agreement it had entered into voluntarily, where enforcement of the agreement would not unreasonably interfere with interstate commerce))

### 3. Who Interprets Section 10501(b)?

- **Board in cases that require a license & environmental review**
- **Either the Board in a declaratory order or a court (either with or without referral to the Board) in other cases**
- **When class exemption was invoked to lease and operate 1,600 feet of track for use in transferring construction and demolition waste between truck and rail, the Board stayed the proceeding to obtain additional information** (Northeast Interchange Ry., LLC-Lease & Oper. Exem.-Line in Croton-on-Hudson, NY, STB Finance Docket No. 34734 et al. (STB served August 5, 2005))



- Board has discretion to decide whether to institute an declaratory order proceeding and denied request that it do so to address solid waste operations on property owned by the New York, Susquehanna and Western Ry. in North Bergen, NJ, and other similarly situated solid waste operations, because the North Bergen facility is permanently closed, petitioners failed to point to an alternative site that would warrant continuing with the proceeding, and the railroad and the New Jersey Department of Environmental Protection are involved in ongoing court litigation related to the facility (National Solid Wastes Management Association, Et Al.-Petition for Declaratory Order, STB Finance Docket No. 34776 (STB served March 10, 2006))

#### 4. Case Law on Facilities

- Preemption applies to proposals to build or acquire ancillary facilities that assist a railroad in providing its existing service, even though the Board lacks licensing authority over the projects
  - i. Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983)
  - ii. Borough of Riverdale — Pet. for Decl. Order — The New York Susquehanna & Western Ry., STB Finance Docket No. 33466 (STB served Sept. 10, 1999, and Feb. 27, 2001)
  - iii. Flynn v. Burlington N. Santa Fe. Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000)
  - iv. Friends of the Aquifer et al., STB Finance Docket No. 33396 (STB served Aug. 15, 2001)
- No preemption where the operation does not constitute transportation by a rail carrier
  - i. High Tech Trans, LLV v. New Jersey, 382 F.3d 295 (3d Cir. 2004); High Tech Trans, LLC- Pet. For Decl. Order- Hudson County NJ, STB Finance Docket No. 34192 (STB served Nov. 20, 2002) (both agreeing with New Jersey Dept. of Environ. Protection that there is no preemption for truck transportation of construction and demolition waste en route to transloading facility, even though a railroad ultimately uses rail cars to transport the debris)
  - ii. Grafton and Upton R.R. v. Town of Milford, Civ. No. 03-40291 (D. Mass. Feb. 14, 2006); Town of Milford, MA- Pet. For Decl. Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (no preemption for planned steel fabrication facilities that are not part of “transportation”)
  - iii. Florida East Coast Ry. v. City of West Palm Beach, 266 F.3d 1324 (11<sup>th</sup> Cir. 2001) (no preemption for aggregate

distribution plant because the plant, although located on railroad property, was not railroad-owned or operated and thus was not part of rail transportation)

- **Activities That Do Qualify for Federal Preemption as Transportation Conducted by a Rail Carrier**

- i. Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005) (preemption for cement transloading facility in Vermont)
- ii. Joint Pet. For Decl. Order- Boston & Maine Corp. v. Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001), aff'd, Boston & Maine Corp. v. Town of Ayer, 206 F.Supp.2d 128 (D. Mass. 2002), rev'd solely on attys fee issue, 330 F.3d 12 (1<sup>st</sup> Cir. 2003) (preemption for automobile loading facility in Massachusetts)
- iii. Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 WL 1113647 (N.D. Ga. 1997) (local zoning and land use permitting regulation for railroad facility preempted)
- iv. Canadian National Ry. v. City of Rockwood, No. 04-40323, 2005 WL 1349077 (E.D. Mich. 2005) (county zoning laws and permitting and preclearance requirements preempted for a railroad's transload facility in Michigan)